

1
2
3
4 UNITED STATES DISTRICT COURT
5 WESTERN DISTRICT OF WASHINGTON
6 AT TACOMA

7 GREGORY S. ROBINSON,

8 Petitioner,

9 v.

10 SCOTT FRAKES,

11 Respondent.

No. 11-5302 RJB/KLS

REPORT AND RECOMMENDATION
Noted for: February 24, 2012

12 Petitioner Gregory S. Robinson filed a habeas petition with eight claims. ECF No. 5.
13 The Court previously denied and dismissed all of Mr. Robinson's claims except for Claim 3 and
14 one portion of Claim 5. ECF Nos. 22 and 25. Respondent filed a supplemental answer
15 concerning these claims. ECF No. 28. Mr. Robinson filed a reply. ECF No. 31.

16 **BACKGROUND**

17 Gregory S. Robinson is in the custody of the Washington Department of Corrections
18 pursuant to a 2006 jury conviction for first degree robbery, first degree burglary, second degree
19 theft, second degree possession of stolen property, and unlawful imprisonment. ECF No. 19,
20 Exh. 1. Mr. Robinson was sentenced to 171 months. *Id.*, Exh. 2.

21 **A. Factual Background**

22 The Court relies on the factual summary of the Washington Court of Appeals:

23
24 Janice Copeland lived alone in an apartment in Sumner, Washington. At
25 4:00 am one morning, Copeland was sleeping when a knock at her front door
26 woke her up. She looked out the window and saw Robinson outside. She
recognized him as the maintenance man who had come to her apartment to fix the

1 faucets in her bathtub a few weeks earlier. Robinson explained that he needed to
2 come in because a leak in her apartment was flooding the apartment below.

3 When Copeland opened the door, Robinson grabbed her, got behind her,
4 and held his hand over her mouth. He told Copeland that he would not rape her,
5 but he wanted money for drugs. He took her into the bedroom, tied her up, and
6 gagged her. He then took her personal and business debit cards, cell phone, and
7 keys to her car, apartment, and post office box.

8 *A. Trial*

9 Despite Copeland's unequivocal identification of Robinson as her attacker
10 at trial, identity was the major issue in the case. The jury in Robinson's first trial
11 was unable to reach a verdict.

12 At the second trial, the State supported Copeland's testimony with
13 additional circumstantial evidence. First, it offered video surveillance tapes from
14 the automated teller machines (ATMs) where Copeland's debit cards were used to
15 obtain \$300 in cash after the robbery; one of the videos was detailed enough to
16 show some facial features that the State argued resembled Robinson. Second,
17 Verndeleao Banks, who lived at the Golden Lion Motel, testified that Robinson
18 purchased cocaine from her with \$300 cash on the day after the robbery.
19 Robinson also gave her some credit cards in a woman's name to use when the
20 cash ran out.

21 Third, the State sought to establish that Copeland's cell phone was used to
22 call a man named Kirby Christopher after the robbery and that Robinson knew
23 Christopher through mutual association with the Golden Lion Motel.² It offered
24 Copeland's cell phone bill as an exhibit during Copeland's testimony to establish
25 that the phone was used to call Christopher; Copeland identified the calls on the
26 bill that she had not made, then read the phone numbers and times of those calls
into the record. The State offered no testimony from the phone company
establishing that the bill was a business record for purposes of the hearsay
exception, and defense counsel did not object.

At the end of the second trial, the jury found Robinson guilty of unlawful
imprisonment, first degree burglary, first degree robbery, second degree theft,
second degree possession of stolen property, and harassment.

B. Sentencing

At sentencing, defense counsel agreed with the standard ranges calculated
by the prosecutor for Robinson's sentences because they both agreed that his
offender score was higher than the statutory maximum score of nine points.
Robinson's relevant criminal history consisted of (1) a 1981 attempted burglary

conviction from California, (2) a 1989 robbery conviction from California, (3) four 1989 rape convictions (rape, oral copulation by force, sodomy by force, and sexual penetration with a foreign object by force) that the State agreed to count as same criminal conduct, and (4) the five current felony convictions. Nowhere in the record did the State identify any comparable Washington crimes by which to classify the California crimes for offender score purposes. Both counsel agreed that Robinson's offender score for the violent offenses was twelve, consisting of two points for the 1981 attempted burglary, four points for the 1989 robbery and rape convictions, one point for having committed the current offenses while on community custody, and five points for the current offenses.

Robinson disagreed with this calculation, arguing that his offender score was only seven points. His attorney acknowledged Robinson's disagreement and argued his objections "on his behalf." Report of Proceedings (RP) at 836. She stated that Robinson was asking the court to conduct a "[c]omparability [t]est" with regard to his 1981 attempted burglary conviction in California, but that he still counted the 1989 convictions as four points. RP at 836. Neither Robinson nor his counsel compared the 1981 California burglary statute with any Washington crime because defense counsel could not find the California statute at issue. The State agreed, however, to exclude the 1981 conviction from Robinson's offender score, resulting in an offender score of ten (still above the statutory maximum).

During Robinson's allocution, he repeated that he was "asking the Court to do a Comparability Test on the out-of-state crimes," but then stated, "I am giving myself the high end for the points I committed in '89, which would be four points." RP at 845. Robinson also asked the court to treat all of his current convictions as the same criminal conduct.

The court ruled that it did not need to perform a comparability analysis, applied the maximum offender score for Robinson's robbery and burglary charges, and sentenced Robinson to the statutory maximum prison sentence on each charge, a total of 171 months.

² Christopher was not a witness at trial, but Banks testified that she knew him and he spent time at the Golden Lion Motel selling drugs. [Court's footnote].

ECF No. 19, Exh. 2 at 1-4. The factual summary of the Washington Court of Appeals is accorded a presumption of correctness pursuant to 28 U.S.C. § 2254(e)(1). *Moses v. Payne*, 555 F.3d 742, 746 n.1 (9th Cir. 2009).

1 **B. Procedural Background**

2 The procedural background is set forth in detail in this Court’s Report and
3 Recommendation of September 12, 2011 (ECF No. 22) and is not repeated here.

4 **ISSUES FOR FEDERAL REVIEW**

5 **Claim 3:** Petitioner’s 5th Amendment right to due process and 6th Amendment
6 right to confrontation were violated when the trial court allowed the jury to
7 review a surveillance video during deliberations.

8 **Claim 5:** Petitioner’s counsel provided ineffective assistance of counsel by not
9 objecting to the jury’s re-reviewing of the surveillance video during deliberations.

10 ECF No. 5, at 9 and 17.

11 **EVIDENTIARY HEARING**

12 A petitioner who fails to develop the factual basis of a claim in state court is not entitled
13 to an evidentiary hearing unless the claim relies on:

14 (i) a new rule of constitutional law, made retroactive to cases on collateral review
15 by the Supreme Court, that was previously unavailable; or

16 (ii) a factual predicate that could not have been previously discovered through the
17 exercise of due diligence;
and

18 (B) the facts underlying the claim would be sufficient to establish by clear and
19 convincing evidence that but for constitutional error, no reasonable factfinder
would have found the applicant guilty of the underlying offense. . . .

20 28 U.S.C. § 2254(e)(2).

21 “[T]he statute applies only to prisoners who have ‘failed to develop the factual basis of a
22 claim in State court proceedings.’” *Williams v. Taylor*, 529 U.S. 420, 430 (2000). “[A] failure to
23 develop the factual basis of a claim is not established unless there is a lack of diligence, or some
24 greater fault, attributable to the prisoner or the prisoner’s counsel.” *Id.* at 432. “Diligence for
25 purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in
26

1 light of the information available at the time, to investigate and pursue claims in state court; it
2 does not depend ... upon whether those efforts could have been successful.” *Id.* at 435; *Baja v.*
3 *Ducharme*, 187 F.3d 1075, 1078-79 (9th Cir. 1999).

4 Even if 28 U.S.C. § 2254(e)(2) does not bar an evidentiary hearing, the decision to hold a
5 hearing is still committed to the Court’s discretion. *Schriro v. Landrigan*, 127 S. Ct. 1933, 1939-
6 41 (2007). A hearing is not required if the allegations would not entitle petitioner to relief under
7 28 U.S.C. § 2254(d). *Id.* at 1939-40. “In deciding whether to grant an evidentiary hearing, a
8 federal court must consider whether such a hearing could enable an applicant to prove the
9 petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief.”
10 *Landrigan*, 127 S. Ct. at 1940. “Because the deferential standards prescribed by § 2254 control
11 whether to grant habeas relief, a federal court must take into account those standards in deciding
12 whether an evidentiary hearing is appropriate.” *Id.* “It follows that if the record refutes the
13 applicant’s factual allegations or otherwise precludes habeas relief, a district court is not required
14 to hold an evidentiary hearing.” *Id.* In determining whether relief is available under 28 U.S.C. §
15 2254(d)(1), the Court’s review is limited to the record before the state court. *Cullen v.*
16 *Pinholster*, ---U.S.---, 131 S. Ct. 1388 (2011). The statute bars consideration of evidence
17 presented for the first time in federal court. *Id.* The undersigned concludes that an evidentiary
18 hearing is not appropriate in this case.

21 STANDARD OF REVIEW

22 Federal courts may intervene in the state judicial process only to correct wrongs of a
23 constitutional dimension. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).
24 Federal habeas corpus relief does not lie for mere errors of state law. *Estelle v. McGuire*, 502
25 U.S. 62, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 110 S. Ct. 3092,
26

1 111 L.Ed.2d 606 (1990); *Pulley v. Harris*, 465 U.S. 37, 41, 104 S. Ct. 871, 79 L.Ed.2d 29 (1984).

2 A federal court cannot grant a writ of habeas corpus to a state prisoner with respect to any
3 claim adjudicated on the merits in state court unless the state court's adjudication of the claim (1)
4 resulted in a decision that was contrary to, or involved an unreasonable application of, clearly
5 established Federal law, as determined by the Supreme Court of the United States; or (2) resulted
6 in a decision that was based on an unreasonable determination of the facts in light of the
7 evidence presented in the State court proceeding. 28 U.S.C. § 2254(d). State court decisions
8 must be given the benefit of the doubt. *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S.Ct. 357
9 (2002).
10

11 A state court decision is "contrary to" the Supreme Court's "clearly established precedent
12 if the state court applies a rule that contradicts the governing law set forth" in the Supreme
13 Court's cases or if the state court confronts a set of facts that are materially indistinguishable
14 from a decision of the Supreme Court and "nevertheless arrives at a result different from that
15 precedent." *Lockyer v. Andrade*, 538 U.S. 63, 73, 123 S.Ct. 1166 (2003) (quoting *Williams v.*
16 *Taylor*, 529 U.S. 362, 405-06, 120 S.Ct. 1495 (2000)). "The 'unreasonable application' clause
17 requires the state court decision to be more than incorrect or erroneous." *Lockyer*, 538 U.S. at
18 75. That is, "[t]he state court's application of clearly established law must be objectively
19 unreasonable." *Id.*
20

21 Under 28 U.S.C. § 2254(d)(2), a federal petition for writ of *habeas corpus* also may be
22 granted "if a material factual finding of the state court reflects 'an unreasonable determination of
23 the facts in light of the evidence presented in the State court proceeding.'" *Juan H. v. Allen*, 408
24 F.3d 1262, 1270 n.8 (9th Cir. 2005) (quoting 28 U.S.C. § 2254(d)(2)). However, "[a]
25 determination of a factual issue made by a State court shall be presumed to be correct," and the
26

petitioner has “the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

DISCUSSION

Both claims that remain for consideration relate to the submission of Trial Exhibit 5, a surveillance video tape that was admitted into evidence and shown to the jury during the course of trial. The video consisted of surveillance from the ATMs where Mr. Robinson used Ms. Copeland’s debit cards to obtain cash. ECF No. 19, Exh. 2, p. 17. The jury asked to see one of the tapes during its deliberations. ECF No. 29, Exh. 33, p. 811. Defense counsel stated to the trial judge that she and Mr. Robinson agreed that the jury could view the videotape during their deliberations because the exhibit was like other admitted exhibits:

We’re okay with the State’s suggestion. ... Every exhibit they are allowed to touch, they can play, replay, listen to whatever portion they want, because that’s what they are supposed to do during deliberations and we’re fine with that.

ECF No. 29, Exh. 33, p. 812.

A. Claim 3 – Viewing Video During Deliberations

Mr. Robinson argues that the trial court violated his due process and confrontation rights when it allowed the jury to view the surveillance video outside the presence of the trial judge and defense. ECF No. 5, pp. 34-37. He argues that the jury had already been given still photographs taken from the video and any re-review of the video should have taken place in open court in the same manner as the trial court had proposed handling the 911 tape. ECF No. 31, at pp. 4, 11-13.

Respondent contends that the Supreme Court has never held that a judge violates the Constitution by allowing the jury to re-review a previously admitted video exhibit and that Mr.

1 Robinson seeks relief on a new rule that is not clearly established and is therefore, barred under
2 both 28 U.S.C. § 2254(d) and *Teague v. Lane*, 489 U.S. 288 (1989).¹

3 When Mr. Robinson raised this issue in state court, the Washington Court of Appeals
4 analyzed the issue as an ineffective assistance of counsel claim and rejected it because Mr.
5 Robinson was unable to show how allowing the jury to view the video had prejudiced him:

6 Robinson's claim fails because he is unable to show how allowing the jury
7 to view the video prejudiced him, i.e., showing a reasonable probability the
8 verdict would have differed otherwise. *See Strickland*, 466 U.S. at 694. The
9 video consisted of surveillance from the ATMs where Robinson used Copeland's
10 debit cards to obtain cash. This evidence is distinguishable from the videotaped
11 testimony at issue in *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985);
12 allowing *testimony* to be reread or replayed is disfavored when it unduly
emphasizes that testimony. *See Binder*, 769 F.2d at 600-01. Here, the video is
more analogous to photographs or other documentary exhibits, which juries are
entitled to review at their leisure. Cf. CR 51(h)....

13 ECF No. 19, Exh. 2, p. 17.

14 Under the Sixth Amendment, a criminal defendant has the right to be tried by an
15 impartial jury and to confront and cross-examine the witnesses who testify against him. *See*
16 *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *Pennsylvania v. Ritchie*,
17 480 U.S. 39, 51, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). The defendant is also entitled to a jury
18 that reaches a verdict on the basis of evidence produced at trial. *Turner v. Louisiana*, 379 U.S.
19 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); *Estrada v. Scribner*, 512, F.3d 1227, 1238 (9th
20 Cir.2008); *Bayramoglu v. Estelle*, 806 F.2d 880, 887 (9th Cir.1986) ("Jurors have a duty to
21 consider only the evidence which is presented to them in open court."). The introduction of
22

23
24
25 ¹ Under *Teague*, a new rule may not be applied or announced in a habeas case unless the rule falls within one of two
26 narrow exceptions. *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989). A "new rule" is one that "breaks new ground,"
"imposes a new obligation on the States or the Federal Government," or "was not *dictated* by precedent existing at
the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis in original); *see also Gilmore*
v. Taylor, 508 U.S. 333, 340 (1993).

1 prejudicial extraneous influences into the jury room constitutes misconduct which may result in
2 the reversal of a conviction. *Parker v. Gladden*, 385 U.S. 363, 364–65, 87 S.Ct. 468, 17 L.Ed.2d
3 420 (1966).

4 Mr. Robinson relies on *U.S. v. Binder*, 769 F.2d 595 (1985), *overruled in part on other*
5 *grounds by United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997). In *Binder*, the Ninth Circuit
6 held that “[u]ndue emphasis of particular testimony should not be permitted after the jury has
7 begun deliberations.” *Id.* at 600. The court was concerned that the rereading or replaying of
8 *testimony*, in addition to the delay involved, could place undue emphasis on testimony
9 considered a second time at such a late stage of the trial. *Id.* (emphasis added). However, a trial
10 court’s decision to replay videotape testimony during jury deliberations will not be reversed
11 absent an abuse of discretion. *Binder*, 769 F.2d at 600; *United States v. Sims*, 719 F.2d 375, 379
12 (11th Cir. 1983), *cert. denied*, 465 U.S. 1034, 104 S.Ct. 1304, 79 L.Ed.2d 703 (1984). There is
13 also, no per se rule against replaying videotaped testimony. The decision to replay testimony is
14 within the broad discretion of the trial judge to be exercised on a case-by-case basis. *Id.* at 600-
15 01; *see United States v. King*, 552 F.2d 833, 850 (9th Cir. 1976) (discretion granted trial judge to
16 reread testimony is large and determination of whether discretion is abused turns on
17 circumstances of the individual case), *cert. denied*, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357
18 (1977). *See also U.S. v. Sacco*, 869 F.2d 499, 501 (9th Cir. 1989).

19 Several federal courts have determined that the rules of evidence gives the trial judge
20 broad discretion to determine whether a jury may re-review previously admitted evidence during
21 its deliberations. *See, e.g., United States v. Muhlenbruch*, 634 F.3d 987, 1001-1002 (8th Cir.
22 2011) (trial court did not abuse its discretion by allowing jury to re-review videotape of
23 defendant’s confession during deliberations); *United States v. Plato*, 629 F.3d 646, 652 (7th Cir.

1 2010) (allowing jury to re-review surveillance video during deliberations was a matter within
2 trial court's discretion); *United States v. Saunders*, 553 F.3d 81, 86-87 (1st Cir. 2009) (whether
3 jury may re-review properly admitted video evidence during deliberations lies within the
4 discretion of the trial court).

5 This case does not involve the replaying or re-reviewing of video taped *testimony*. Here,
6 the jury re-reviewed surveillance videos from the automated teller machines where Ms.
7 Copeland's debit cards were used to obtain \$300 in cash after the robbery; one of the videos was
8 detailed enough to show some facial features that the State argued resembled Mr. Robinson.
9 ECF No. 19, Exh. 2, p. 2. The jury had viewed the surveillance tapes during trial and, according
10 to Mr. Robinson, had already been given photographic stills taken from the surveillance tape.
11 Thus, as was noted by the Washington Court of Appeals, re-reviewing the surveillance tape was
12 no different than viewing photographs or other types of documentary evidence that are routinely
13 allowed in the jury room.
14

15 Accordingly, Mr. Robinson has not shown that the trial court abused its discretion or that
16 the state court decisions are contrary to or an unreasonable application of clearly established
17 federal law. Accordingly, the undersigned recommends that this claim be denied.
18

19 **B. Claim 5 – Ineffective Assistance of Counsel**

20 Mr. Robinson argues that his trial counsel rendered ineffective assistance when she
21 agreed to allow the jury to view the surveillance video during its deliberations. ECF No. 5 at 17,
22 42-43. He argues that any re-review of the video should have been handled in the same as the
23 trial judge had proposed handling the 911 tape in that it should have been re-played in the
24 courtroom in the presence of the trial judge and counsel. He maintains that the failure to do so
25 was prejudicial to him because identification was the central issue in this case.
26

1 The primary question when reviewing a claim of ineffective assistance of counsel under
2 AEDPA is not whether counsel provided ineffective representation, or whether the state court
3 erred in its analysis of the claim. *Schiro v. Landrigan*, 127 S. Ct. at 1939. The primary issue is
4 whether the state court adjudication was unreasonable. *Landrigan*, 127 S. Ct. at 1939; *Bell v.*
5 *Cone*, 535 U.S. at 699. The Court owes a great level of deference to the state court adjudication.
6 *Yarborough*, 540 U.S. at 5-6. Because counsel has wide latitude in deciding how best to
7 represent a client, review of counsel’s representation is highly deferential. *Id.* Review is
8 “doubly deferential when it is conducted through the lens of federal habeas.” *Id.* at 6.

10 To show ineffective assistance of counsel, a petitioner must satisfy a two-part standard.
11 First, the petitioner must show counsel’s performance was so deficient that it “fell below an
12 objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. at 686. Second, the
13 petitioner must show the deficient performance prejudiced the defense so “as to deprive the
14 defendant of a fair trial, a trial whose result is unreasonable.” *Id.* The petitioner must satisfy
15 both prongs to prove his claim of ineffective assistance of counsel. *Id.* at 697.

17 Under the first prong, the petitioner must specifically show “counsel made errors so
18 serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth
19 Amendment.” *Strickland*, 466 U.S. at 687. “There are countless ways to provide effective
20 assistance in any given case. Even the best criminal defense attorneys would not defend a
21 particular client in the same way.” *Id.* at 689. Imposing a detailed set of rules “would interfere
22 with the constitutionally protected independence of counsel and restrict the wide latitude counsel
23 must have in making tactical decisions.” *Id.* The Supreme Court has not articulated specific
24 guidelines for appropriate attorney conduct. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

1 Consequently, the proper measure remains reasonableness under prevailing professional norms.
2 *Id.*

3 “Judicial scrutiny of counsel’s performance must be highly deferential.” *Strickland*, 466
4 U.S. at 689. “[I]t is all too easy for a court, examining counsel’s defense after it has proved
5 unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *Id.*
6 Every effort must be made to “eliminate the distorting effects of hindsight,” and to judge
7 counsel’s performance from counsel’s perspective at the time of trial. *Id.* “Because of the
8 difficulties inherent in making the evaluation, a court must indulge a strong presumption that
9 counsel’s conduct falls within the wide range of reasonable professional assistance....” *Id.*
10 “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant
11 decisions in the exercise of reasonable professional judgment.” *Id.* at 690. The Court always
12 applies this presumption of competence. *Id.* at 689.

13
14 Under the second prong, that the petitioner must prove prejudice from counsel’s allegedly
15 deficient representation. *Cullen v. Pinholster*, --- U.S. ---, 131 S. Ct. 1388, 1403 (2011). It is not
16 enough that counsel’s errors had “some conceivable effect on the outcome.” *Strickland*, 466
17 U.S. at 693. Rather, the petitioner must show “that, but for counsel’s unprofessional errors, the
18 result would have been different.” *Id.* at 694. The petitioner “must show that there is a
19 reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings
20 would have been different.” *Id.* “That requires a ‘substantial,’ not just ‘conceivable,’ likelihood
21 of a different result.” *Pinholster*, 131 S. Ct. at 1403 (quoting *Harrington v. Richter*, --- U.S. ---,
22 131 S. Ct. 770, 791 (2011)).
23
24
25
26

1 As noted above, when the Washington Court of Appeals reviewed Mr. Robinson's claim
2 relating to the surveillance video tape, it analyzed the claim as an ineffective assistance of
3 counsel claim and rejected it:

4 Robinson argues that defense counsel was ineffective for failing to object
5 to sending a video exhibit into the jury room during its deliberations. Robinson's
6 claim fails because he is unable to show how allowing the jury to view the video
7 prejudiced him, *i.e.*, showing a reasonable probability the verdict would have
8 differed otherwise. *See Strickland*, 466 U.S. at 694. The video consisted of
9 surveillance from the ATMs where Robinson used Copeland's debit cards to
10 obtain cash. This evidence is distinguishable from the videotaped testimony at
11 issue in *United States v. Binder*, 769 F.2d 595 (9th Cir.1985); allowing *testimony*
to be reread or replayed is disfavored when it unduly emphasizes that testimony.
12 *See Binder*, 769 F.2d at 600-01. Here, the video is more analogous to
photographs or other documentary exhibits, which juries are entitled to review at
their leisure. *Cf.* CR 51(h). Defense counsel's acquiescence to allowing the jury
to view the video in the jury room was not deficient performance.

13 Exhibit 2, at 17 (emphasis in original).

14 Defense counsel recognized that the surveillance tape was like every other admitted
15 exhibit. She and Mr. Robinson agreed that the jury could view the surveillance tape during
16 deliberations. ECF No. 29, Exh. 33, p. 812. As noted by the Washington Court of Appeals,
17 allowing the jury to view the surveillance tape was not the same as allowing the jury to listen to
18 *testimony* being re-read or replayed. Mr. Robinson argues that the jury's request to re-review the
19 surveillance video was an indication that they were having difficulty with identification
20 evidence. ECF No. 31, p. 4. Even if this is true, the jury could re-review the evidence. Whether
21 this occurred in the jury room or in the courtroom was completely within the court's discretion.
22 Mr. Robinson fails to show a reasonable probability that his counsel's failure to object to
23 allowing the jury to re-review the surveillance video during their deliberations would have
24 affected their verdict. Accordingly, the undersigned recommends that this claim be denied.
25
26

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6

Based on the foregoing discussion, the undersigned recommends that Claims 3 and 5 of Mr. Robinson's habeas petition be **denied**. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report and Recommendation to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **February 24, 2012**, as noted in the caption.


Karen L. Strombom
United States Magistrate Judge